SUPREME COURT, U. S.

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In The

Supreme Court of the United States

October Term, 1973

No. 73-1613

LAM MAN CHUNG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

October Term, 1973

No.

LAM MAN CHUNG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Lam Man Chung, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 28, 1974.

OPINION BELOW

No opinion was rendered by the Court of Appeals. No opinion was rendered by the District Court for the Southern District of New York.

The order of the Court of Appeals affirming the conviction is reproduced in the appendix to this brief.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 28, 1974. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Did the trial court err by submitting crucial hearsay testimony to the jury on the substantive count, where the hearsay was received subject to connection on the conspiracy count, and the conspiracy count was dismissed by the trial judge on a motion pursuant to Rule 29 of the Federal Rules of Criminal Procedure?

STATEMENT OF THE CASE

Indictment 73 Cr. 920 charged the petitioner Lam Man Chung (also known as Ja B. Lam), along with defendants Wing Piu Lai, Yuet Lan Lai, and Juan Pang Chea with conspiracy and substantive violations of the narcotics laws. The petitioner Lam was charged with conspiracy in count 1, and one substantive violation of possession with intent to distribute a controlled substance in count 5.

The defendants were tried jointly [1] in the United States District Court for the Southern District of New York (Lasker, D. J. and a jury). At the close of the evidence, a motion pursuant to Rule 29 of the Federal

1. During the trial a severance was granted to the defendant Yuet Lan Lai (120). At a later retrial of her case before Judge Lasker she was found not guilty.

Rules of Criminal Procedure was granted to dismiss the conspiracy count (count 1) as against the petitioner Lam. He was, however, convicted by the jury for the substantive violation (count 5). Defendant Juan Pang Chea was found guilty under counts 1, 2, and 4, and defendant Wing Piu Lai was convicted under counts 1, 2, 3 and 6.

On December 21, 1973, the petitioner Lam was sentenced to five years in jail, to commence upon the expiration of a previously imposed prison term he was then serving, and a fine of $5,000 was assessed. A term of 6 years special parole was also imposed, and the sentence was made subject to 18 U.S.C. Section 4208(a)(2), allowing eligibility for parole at any time in the discretion of the parole board.

STATEMENT OF FACTS

On April 30, 1973 BNDD agents Quarequio and Tripp, posing as Angelo Marino and Ray, were introduced to the defendant Chea who, they were told, had heroin for sale (21-7). Chea told the agents he headed a gambling house in Chinatown, had been in Cuba, and would have to talk over the heroin deal with a partner who was not then in the city (27-9).

On May 31, the agents met Chea again. Chea said he had a connection for drugs in Holland and England, and would have to go there. The drugs they had previously talked about were, according to Chea, already sold by his Cuban partner in Miami. Chea said the price was $13,000 per kilo, and added that Quarequio would have to find a Chinaman to accompany Chea to Europe to arrange the procurement of the drugs (30-7). Chea boasted that he

didn't need money since his gambling business had made over $100,000 in three weeks (38). Nevertheless, Quarequio would have to "front" the money for the narcotics purchase (38).

On June 14 the agents again met Chea for dinner. Quarequio told Chea that he (Quarequio) would be able to bring Chea's drugs back from Holland (44). During this discussion, Chea mentioned that he had a friend, Ja B. Lam, who had asked "if he could become a partner with him in the trafficking of narcotics" (43, 258). However, Chea did not mention whether Lam had become a partner or not (258).

On June 18 the three met again. Chea said he had found someone who could supply two ounces of heroin at $1,600 per ounce (45). Chea named this supplier as Ja B. Lam, and said he was a friend and a gambler in his gambling house (46). Chea also told Quarequio that he would inform him later if he was still going overseas (46).

On June 25 Chea said he had found someone to go with him to Holland, and also said he had an Australian friend (allegedly the defendant Lai, 213) who had 4 pounds of brown rock heroin (48). Chea gave Quarequio a sample which he took from his sock (48).

On June 29 Quarequio told Chea he was ready to buy one pound of heroin and showed him $11,000 (73). Chea made a phone call and told the agent he had ordered "one order of chow mein" from his connection, and set delivery for 4 p.m. that day (74, 272-3). At 4:20 the defendant Lai placed a paper bag in Tripp's car, and when Tripp gave a

signal, Quarequio, in another car, gave Chea the money (77, 283). The bag placed in Tripp's car contained a substance which field tested for heroin (80).

On July 3 Quarequio told Chea he wanted another pound, and Chea said he couldn't supply it that day because his connection was away for a week (81-2).

On July 11 Tripp received another pound of heroin from Chea outside his apartment at 261 Broome Street. Tripp gave Chea $13,000 (300, 388-9). At 10:30 p.m. that night, two and one half hours after the "buy", the petitioner Lam arrived in the vicinity by taxi cab. He stood on the corner and looked at the street sign and then entered 261 Broome Street. He was carrying nothing with him (390, 471, 435). Shortly before midnight, Lam came out carrying an A & P shopping bag. He was followed and arrested a few blocks away. Inside the bag was a melon, a large piece of wrapping paper, and under the paper, a package of brown rock heroin (391, 450, 452, 455, 471-3). No fingerprint test of the bag containing the heroin was made (600-4). An address book found in Lam's possession contained Chea's name written in Chinese and Chea's telephone number written backwards (475-6).

Chea was arrested the next night, and the money Tripp gave him was found in his apartment (401, 404-5). The defendant Lai was also arrested on July 12 and 4 pounds of brown rock heroin was uncovered in his apartment. Lai also was found in possession of money which the government had paid to Chea (481-4, 497, 508-11).

THE DEFENSE

Shirley Moy, a Chinese interpreter, testified that Chinese write from right to left, the reverse of the procedure in English (1119-20).

REASONS FOR GRANTING THE WRIT

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING HIGHLY DAMAGING, BUT INADMISSIBLE, HEARSAY TESTIMONY TO BE SUBMITTED TO THE JURY.

Introduction

Acting in an undercover capacity, two government agents, Quarequio and Tripp, described their efforts over a 2-½ month period to negotiate the purchase of heroin from the defendant Chea. At numerous meetings with Chea they discussed prices, sources for the drugs, and the details of obtaining it, and eventually made two "buys", one on June 29, 1973 from Chea and Lai, and the other on July 11 from Chea. During these extended conversations, from April 30 to July 11, the petitioner Lam's name was mentioned twice by Chea, first on June 14 and then on June 18.

On June 14, during a dinner meeting between Chea and the agents, Chea mentioned that a friend, Ja B. Lam, had asked "if he could become a partner with him (Chea) in the trafficking of narcotics" (43, 258). On June 18 during a conversation between Chea and Quarequio, Chea

allegedly named Lam as the supplier of two ounces of heroin. [2]

Despite an obviously thorough and intensive investigation, there was no other evidence at all of Lam's participation until July 11, 1973. On that night, a few hours after Tripp had made a second "buy" from Chea, Lam arrived at Broome Street in a taxicab, looked up at the street sign on the corner and entered 261 Broome Street, the apartment building in which Chea lived. Lam was carrying nothing. An hour and a half later, he left carrying an A & P shopping bag which, upon his arrest a few blocks away, was found to contain a melon, wrapping paper, and, underneath, one pound of heroin.

At the close of the government's case, counsel moved pursuant to Rule 29 of the Federal Rules of Criminal Procedure to dismiss the conspiracy count against Lam on the ground that there was insufficient proof beyond the hearsay for Lam's single act to make him a conspirator. The Court agreed, and dismissed count one of the indictment against Lam. Implicit in this ruling was the court's finding that the government had failed to prove, under the standard of *Glasser v. United States*, 315 U.S. 60 (1942) and *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), that Lam was a conspirator. However, despite this finding, the Court refused to strike the hearsay testimony from the June 14 and June 18 conversations

2. Unlike the June 14 conversation, the June 18 conversation was tape recorded. The transcript submitted to the jury contained both the government and defense version of what was said. The major area of conflict between the two was whether Chea, in his broken English, said of Lam "no him" or "know him."

which had been admitted against Lam subject to connection on the conspiracy count. Instead, the court allowed the jury to consider the hearsay in deliberating on the substantive count, the sole remaining charge against Lam (1125-7).

The petitioner Lam contends that the refusal to strike the hearsay and the refusal of the Court to instruct the jury to disregard it was prejudicial error which directly resulted in Lam's conviction. Moreover, not only was the hearsay rendered inadmissible under a co-conspirator or joint venture theory by the court's granting of the Rule 29 motion, but each of the hearsay statements was subject to other serious objections. The statement of June 14 was double hearsay, and thus too remote to be admissible under any theory, and the June 18 statement was not surrounded by sufficient "indicia of reliability" to come within the holding of the *United States v. Puco*, 476 F.2d 1099 (2d Cir. 1973).

I.

It is clear that Lam Man Chung was not present at either the June 14th or the June 18th meetings. Nor did he ever specifically adopt the statements of Chea. Accordingly what Quarequio or Tripp said that Chea said that Lam said was obviously hearsay as to the appellant Lam Man Chung. The government, however, sought its introduction under the conspiracy exception to the hearsay rule. The defendant Lam objected to the introduction of this evidence and under the Court's order was allowed a continuing objection to such hearsay testimony. Accordingly, the testimony was taken subject to connection.

However, at the close of the government's case the conspiracy count was properly dismissed by the Court and with it the justification of the admission of this hearsay. For, no longer could the introduction of this highly dubious hearsay be permitted under the conspiracy exception, the Court having concluded properly that there was insufficient proof of the defendant Lam's participation in the conspiracy. To conclude otherwise would be, to paraphrase the Court of Appeals in *Geaney*, to lift hearsay by its own bootstraps.

As stated in *Geaney*, 417 F.2d at 1120:

> "While the practicalities of a conspiracy trial may require that hearsay be admitted 'subject to connection,' the judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances. If it has, the utterances go to the jury for them to consider along with all the other evidence in determining whether they are convinced of defendant's guilt beyond a reasonable doubt.
>
> *If it has not, the judge must instruct the jury to disregard the hearsay or, when this was so large a proportion of the proof as to render a cautionary instruction of doubtful utility, as could well have been the case here, declare a mistrial if the defendant asks for it.*" (Emphasis supplied.)

The prosecutor, however, resourcefully posed another theory on which to allow the introduction of the hearsay testimony. The government argued the "joint venture" theory to the Court, claiming that even if there is no proof or insufficient proof of the conspiracy there was adequate proof of a joint venture, which involves the interplay of the agency principles underlying the conspiracy exception, to permit the introduction of this testimony. See, *United States v. Pugliese*, 153 F.2d 497 (2d Cir. 1945).

This argument was and remains falacious. First, whether hearsay is sought to be introduced under the conspiracy exception or the joint venture theory there must be a showing that the defendant against whom this testimony is sought to be introduced was a participant in the joint venture. To hold any less would be to allow the hearsay to be lifted by its own bootstraps. While there may be metaphysical distinctions between a joint venture and a conspiracy, whatever distinctions that may exist are unimportant on the issue of the introduction of hearsay testimony here on either of the theories. The same proof that was offered to support the conspiracy (i.e., Lam's activities on July 11) is the sole proof which can be considered in support of the joint venture theory. But if it is insufficient for one, it is surely insufficient for the other. Lam's single and individual act simply does not provide proof of combination with others, either as a conspirator or as a joint venturer. Accordingly, when the Court below properly concluded that there was insufficient proof to link the defendant Lam with the conspiracy charged in Count One, it found *sub silentio* insufficient proof of a joint venture such as to allow the introduction of this testimony. If there was a joint venture there was the conspiracy on the facts of this case. Clearly there was neither.

Further, and perhaps more clearly, there was no proof *aliunde* the hearsay that Lam Man Chung was involved in anything prior to July 11, 1973 — absolutely none whatever. This is critical, for even if a joint venture existed between Lam Man Chung and Juan Pang Chea on July 11, 1973, such a joint venture cannot authorize the admissibility of hearsay had on June 14th and June 18th, 1973, almost one month before. Indeed, as in conspiracy cases where the declarations must be made "while the conspiracy is pending and in furtherance of its object" *Krulewitch v. United States*, 336 U.S. 440 (1949); *Lutwak v. United States*, 344 U.S. 604 (1953), the hearsay statements of a joint venturer are also only admissible if made during the existence of the joint venture and in furtherance of its objects (see, *United States v. Pugliese*, 153 F.2d 497, *supra*).

In *United States v. Cafaro*, 455 F.2d 323 (2d Cir. 1972), one of the hearsay statements was regarded as being erroneously admitted because there was no evidence "indicating that this statement was made in furtherance of the conspiracy, or, indeed that (the putative conspirator) had yet become a party to it." 455 F.2d at 327. The same situation exists here. Indeed, implicit in the June 14 statement that Lam asked if he could become a partner is the fact that he was then not a partner or participant in any conspiracy or joint venture. And the June 18 statement similarly precedes by almost a month any act on his part in this case and any evidence showing Lam's entry into a criminal combination.

Thus, since the hearsay occurred before any joint enterprise was shown to have taken place, it is absolutely inadmissible on the substantive count. Moreover, the

hearsay in this case does not constitute verbal acts. See, *Lutwak v. United States*, 344 U.S. 604, *supra*. In each instance we are dealing with simple statements. And although it may be true that a co-conspirator or joint venturer may be responsible for the acts committed prior to his entry into the unlawful enterprise, it is not true that he is responsible criminally for mere statements made by his new partners in crime prior to his entry. Thus, even as a joint venturer with Chea on July 11, 1973, Lam is not accountable for statements that Quarequio says that Chea made many weeks prior. Accordingly, it was all together improper for the Court to allow the jury to consider the hearsay testimony.

II.

Additionally, each of the statements is subject to serious objection on other grounds, regardless of whether a conspiracy or joint venture was proved by the facts. The testimony of Agents Quarequio and Tripp regarding the June 14 meeting, for instance, is double hearsay. For Quarequio reported what Chea said that Lam said. Such double hearsay is completely inadmissible, since it is too remote to be reliable and compounds the confrontation problems inherent in hearsay. Indeed, even if the statement of Lam to Chea would have been admissible if Chea had testified to it, it is not admissible on double hearsay grounds when the agent testified to Chea's version. In *Pinkard v. United States*, 240 F.2d 632 (D.C. Cir. 1957) a police officer testified to a spontaneous declaration made by the victim to another person who had reported it to the police officer. The Circuit Court categorized the testimony as double hearsay and completely inadmissible, though, of course, spontaneous declarations are admissible once

removed as exceptions to the hearsay rule. The situation is the same here, since Lam's alleged statement about wanting to become a partner in narcotics was testified to by the agent who heard it from someone else.

The statement of June 18, furthermore, does not contain the "indicia of reliability" which would allow it to come within the holding in *United States v. Puco*, (Puco III), 476 F.2d 1099 (2d Cir. 1973). In *Puco* an agent testified that one of the defendants (Gonzales) pointed out Puco to him and stated that Puco was a supplier. Since Gonzales and Puco were both co-conspirators, in contrast to the case here, Gonzales' statement was admissible against a hearsay objection since it was made in furtherance of the conspiracy. However, the Court realized that the inquiry was not ended because of the constitutional issue raised by application of the Confrontation Clause. 476 F.2d at 1102; see also, *Dutton v. Evans*, 400 U.S. 74 (1970); *California v. Green*, 399 U.S. 149 (1970). Applying the standards of *Dutton*, the Circuit Court in *Puco* concluded that the Confrontation Clause did not bar the admission of the agent's testimony reporting Gonzales' identification of Puco as the supplier. And the reasons pointed to by the Court in *Puco* for admitting the declaration show that the June 18 declaration in the present case is inadmissible, the justification for its reception in evidence being absent here. Specifically, the Court explained that

> "for future applications of *Dutton* to similar situations, we suggest that when a co-conspirator's out-of-court statement is sought to be offered without producing him, the trial judge must

> determine whether, in the circumstances of the case, that statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination" 476 F.2d at 1107 (on pet. for rehearing).

In *Puco* the Court concluded that there was sufficient indicia of reliability because (1) the Gonzales' statement was not tainted by any motive to falsify; (2) there was no reasonable probability that Gonzales was in error because Puco appeared at the time Gonzales said his supplier would, and entered the predicted building with a suitcase; (3) Gonzales followed Puco into the building and emerged with the agreed-upon cocaine; and (4) Puco fit the description that Gonzales had previously given of his source. 476 F.2d at 1104. In the present case, these indicia of reliability are absent. Lam was not present in the vicinity carrying out activities related to supplying the co-conspirator when Chea made the statement; indeed, Lam was not even seen by the agents until July 11, almost a month later. In other words, there were no acts committed by Lam at the time which in any way supported Chea's characterization of him as a supplier. Too, and of utmost importance, the evidence showed that the agents themselves were aware of Chea's unreliability and penchant for puffing. Indeed, they could not help but notice. During their many meetings Chea tried to impress them with obviously inflated stories of his own wealth, importance and accomplishments. In particular, Chea tried to impress his "customers" about the extent of his narcotics dealings, alleging partners in Cuba and New York, connections in Holland, England and Australia, and conjuring of pictures of 50 kilogram deals and of the vast sums of money he reaped from his enterprise (200-6). While claims of this type may fit some narcotics dealers

involved in large scale transactions, the agents must have been struck by the disparity in this case between Chea's posturing and the actual extent of the deals he made — two one pound sales and a third offer of two ounces of heroin. Indeed, as indicated by the tape of June 25, the agents not only were aware of Chea's exaggerations, but were frustrated by his failure to produce what he boasted he could. Thus, on June 25, after Chea left the undercover vehicle, but before the tape recorder was turned off, Quarequio commented to his partner about Chea, "Do you believe that Ray. Do you believe that, he never did it in his life. This guy is eaten me up" (Transcript of June 25 Tape, p. 18).[3] Consequently, without sufficient indicia of reliability, the June 18 hearsay statement violated the Confrontation Clause, even assuming arguendo that Lam was a co-conspirator or joint venturer.

Furthermore, as to both statements, the cases strongly suggest that they are no more than narrative hearsay, accounts of past activities not made in furtherance of a conspiracy. As stated in *United States v. Birnbaum*, 337 F.2d 490 (2d Cir. 1964), "the fact that one conspirator tells another something relevant to the conspiracy does not alone make the declaration competent; the declaration must itself be an act in furtherance of the common object; mere conversation between conspirators is not that." Thus, in *Birnbaum* the inadmissible statement by the appellant "declaring himself a partner" is equivalent to Chea's statement here that Lam wished to become a partner. Neither is admissible.

3. Though the government argued in summation that this statement did not indicate disbelief of Chea (1245), it is more than reasonable from the facts, the words and the intonations on the tape that the agents were expressing grave doubts about what Chea was telling them.

III.

Finally, there can be no doubt that the hearsay conversations were critical to the jury's determination of Lam's guilt. Though Lam was found in possession of drugs, counsel argued forcefully in summation that there was insufficient proof to show that Lam himself knew what was in the A & P shopping bag, beneath the wrapping paper and the melon. There had been no proof regarding how Lam acquired the bag, or what he was told when it was given to him. He might, of course, have been knowingly delivering or buying the heroin [4] or he might have been asked to deliver a melon, not knowing what was hidden on the bottom of the bag. This argument, stressed at length by counsel (1135-8, 1152-5, 1164-5), clearly had an impact on the jury and caused them great concern, as was shown by the requests to the Court made during deliberations. During the nine hours it took to reach a verdict, the jury sent four notes to the Court. They specifically asked for the excerpt of the June 14 conversation where Chea allegedly said that Lam wanted to become a partner (1333), they specifically asked for the tape of the June 25 incident where Quarequio asked his partner if he believed that Chea had done what he said he did (1332, 1340, 1351), they specifically asked for Lam's address book (1333), and they specifically asked for the tape and transcript of the June 18 meeting, where Chea, according to the government's interpretation, named Lam

4. In view of the fact that Chea, at least in his dealings with the agents, always insisted on "front money," it is unlikely that Lam had purchased the pound of heroin from Chea, since only the government money was found in Chea's apartment when it was searched the next day.

as a supplier (1333). Indeed, at the jury's request this crucial conversation was played three times (1352-3). Obviously, then, the resolution of the issue of Lam's knowledge of what was in the bag was directly based upon the hearsay testimony which should never have been considered at all.

Accordingly, since the hearsay was inadmissible, particularly after the finding that there was insufficient evidence of Lam's participation in the conspiracy, and since the hearsay was unquestionably crucial to the ultimate determination of guilt, there must be a new trial.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX
ORDER OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of March one thousand nine hundred and seventy-four.

Present:

HON. IRVING R. KAUFMAN,

Chief Judge

HON. J. JOSEPH SMITH

HON. ROBERT P. ANDERSON

Circuit Judges.

United States,

Plaintiff-Appellee,

v. 74-1042

Wing Piu Lai, Yuet Lan Lai, Juan Pang Chea, Lam Man Chung a/k/a Jab Lam-1 & 5 a/k/a William Lam,

Defendants,

Order of the Court of Appeals

William Lam,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

By Vincent A. Carlin
Chief Deputy Clerk